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IN THE SUPREME COURT OF THE STATE OF
UTAH

STATE OF UTAH,)	
Plaintiff and Respondent,)	
-vs-)	Case
)	No.
CRAIG CARLSEN,)	11884
Defendant and Appellant.)	

BRIEF OF APPELLANT

ON APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE STATE OF
UTAH, IN AND FOR BOX ELDER COUNTY
HONORABLE LEWIS JONES
JUDGE PRESIDING

Craig Carlson
P.O. Box 250
Draper, Utah
84020

Propria Persona

Vernon B. Romney
Attorney General of Utah
State Capitol Building
Salt Lake City, Utah
84114

Attorney for Respondent

FILED

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IN THE SUPREME COURT OF THE STATE OF
UTAH

STATE OF UTAH,)	
Pleintiff and Respondent,)	
-vs-)	Case No.
)	11884
CRAIG CARLSEN,)	
Defendant and Appellant.)	

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

The appellant, Craig Carlsen, appeals from his conviction of Grand Larceny in violation of Section 76-38-4 Utah Code Annotated 1953.

DISPOSITION IN THE LOWER COURT

The appellant was charged with the crime of Grand Larceny by information filed in the First Judicial District Court of the State of Utah, In and For the County of Box Elder. He was first arraigned on Feb-

ruary 21, 1969 where he duly entered a plea of not guilty. Trial by jury commenced on May 7, 1969 and concluded the same day. The jury on the same day found the defendant guilty of the information filed therein. On May 27, 1969 the Honorable Lewis Jones sentenced the defendant to the Utah State Prison for a indeterminate term of not less than one nor more than ten years. The court granted stays of execution up until August 14, 1969 where the court again sentenced the defendant to the Utah State Prison for a indeterminate term of not less than one nor more than ten years.

RELIEF SOUGHT ON APPEAL

The appellant submits that his conviction in the lower court should be reversed; or if the Court does not feel justified by the facts in so doing that it should reverse the conviction and remand the case back for a new and fair trial.

STATEMENT OF FACTS

The following is a summary of the evidence and testimony adduced at the trial.

Mr. Wallace A. Bowden testified that he was at work on the morning of January 5, 1969 at the Salt Lake Suburban Sanitation Treatment Plant, Six-fifty West 3300 South in Salt Lake City, Utah (Tr. 6). While at work he observed a truck and car pull in, turn around and stop where three men got out and transferred white packages from the truck to the car (Tr. 7-9, 13-14). While observing the three men he telephoned the Sheriff's Office to report the incident and a Deputy Sheriff arrived (Tr. 10).

Mr. Earl William Julian a Salt Lake County Deputy Sheriff testified that he went to the scene that was reported (Tr. 27). He observed meat in the back of the truck and in the back seat of the car (Tr. 30-31, 33-35).

Mr. Gary Lynn Hill testified that he was doing business as Box Elder Meat Packing in Brigham City, Utah (Tr. 53). The packing plant had meat missing but he did not know the exact amount, who took it or when it was taken (Tr. 54-56).

Mr. Lee Frank Krebs a Salt Lake County Deputy Sheriff testified to the photographs he took of the truck and car (Tr. 66-67).

ARGUMENT

POINT I

THE APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT OF THE PRIVILEGE AGAINST COMPELSORY SELF-INCRIMINATION AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION

In the case of Miranda v. Arizona, 384 U.S. 436, the Supreme Court of the United States, held, that police have to give an

individual a constitutional warning before interrogation as guaranteed by the Fifth Amendment and applicable to the states by reason of the Fourteenth Amendment Due Process Clause, United States Constitution. The court said:

The principles announced today deal with a protection which must be given to the privilege against self-incrimination. When the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way it is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

In the instant case Officer Julian testified at (Tr. 28-29):

A : Also there was a '58 Chev two-door hardtop which later turned out that Kendricks was driving; on the back seat of this car there was a number of packages of meat as well as what appeared to be hamburger that had been opened, sitting on a big plastic tray or dish you might call it. And then I asked them what they were doing with the meat and they said they'd brought it down from this Del Olsen

Distributing Company to sell, and so--
(Emphasis Added)

The Court: Let's find out who he was talking to now in fairness--

C : Now which one of the defendants were you talking to?

A : At this time I was talking to Carlson, and he stated he had brought this from the Del Olson Meat Distributing to sell. Brought it to Salt Lake to sell it. (Emphasis Added)

and then he testified at (Tr. 28):

A : Like I say, I looked in the back of this blue panel truck and there was a number of trays with wrapped meat, labeled "steak," so on, "pork chop," "hams," also labeled "Box Elder Meat Packing" as well as "Del Olson Meat Processing Company."

and testified at (Tr. 33):

C : Officer Julian, you say that you read on some of these white wrappers Box Elder Meat Packing and on some of them Del Olson Distributing Company?

A : Del Olson Meat Processing. Anyway, it was a Del Olson Meat Processing or Distributing as well as the Box Elder.

Officer Julian testified to every event that occurred between the time he arrived at

the scene and the time he interrogated the defendant (Tr. 27-28), but at no time did he give the defendant the constitutional warning as set out in Miranda, supra.

The appellant was under restraint of his freedom by Officer Julian during the interrogation where the appellant answered questions of an incriminating nature without being given a constitutional warning of any sort. The questions the appellant did answer were subsequently used against him at the trial. The appellant therefore was deprived of his constitutional right of the privilege against compulsory self-incrimination and due process of law under Miranda, supra.

POINT II

THE APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO COUNSEL DURING IN-CUSTODY INTER-ROGATION AND DUE PROCESS OF LAW UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION

In Miranda, supra, the Supreme Court of the United States, also held, that the right to counsel begins when an individual is first subject to police interrogation as guaranteed by the Sixth Amendment and applicable to the states by reason of the Due Process Clause of the Fourteenth Amendment, United States Constitution.

Even though this right can be waived, the prosecution must meet certain requirements before it can be a valid waiver.

In the case of Carnley v. Cochren, 369 U.S. 506, the Supreme Court of the United States, held, that the prosecution must spread on the record the prerequisites of a valid waiver of the Sixth Amendment right to counsel. They held, presuming a waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an

accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver.

In the instant case the record does not show that the appellant was offered counsel by Officer Julian before he interrogated the appellant (Tr. 28-29). The appellant not having waived his right to counsel by the record not showing an offer or a valid waiver of that offer to meet the requirement of Carnley, supra. The appellant therefore was deprived of his right to counsel and due process of law under Miranda, supra.

POINT III

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY NOT PROPERLY ADMONISHING THE WITNESSES FOR EXCLUSION FROM THE COURTROOM

Defense counsel motioned the trial court for the exclusion of the State's witnesses from the courtroom (Tr. 4-5). Mr. Gary Hill

testified that during the noon recess, he, Mr. Daines, Mr. Bowden and Mr. Julian had dinner together and during dinner they had a general discussion of their testimony (Tr. 58-59, 61-62).

Section 77-15-12 Utah Code Annotated, provides

While a witness is under examination, the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they have all be examined.

Rule 43 (f) Utah Rules of Civil Procedure, provides,

Upon motion of either party, the court shall exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of the other witnesses.

In the instant case defense counsel motioned the trial court for mistrial based on the grounds that witnesses when excluded were not properly admonished (Tr. 83-84).

The trial court denied the motion (Tr. 86).

The trial court erred by not complying with Section 77-15-12 and Rule 43 (f)

M.R.C.P. by not properly admonishing the witnesses to stay separated when they were excluded from the courtroom.

The appellant was prejudiced by Mr. Hill discussing his proposed testimony and the testimony of the two State's witnesses that had testified that morning. The initial purpose of the discussion was to prepare Mr. Hill's testimony to meet the occasion instead of it being his own true testimony. It was bad faith on the part of the prosecution for discussing the proposed testimony of Mr. Hill with the two State's witnesses that had testified that morning. It should of been the duty of the prosecution to keep the witnesses from discussing the matter and to stay separated but contrerarywise the prosecution

incouraged the witnesses to do the contrary.

POINT IV

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR
AND ABUSED ITS DISCRETION BY CHARGING THE
JURY WITH ERRONEOUS INSTRUCTIONS

Defense counsel took exceptions to the instruction number two and the paragraph numbered first and a certain phrase in the instruction numbered five (Tr. 87).

24 Corpus Juris Secundum, Criminal Law, Section 1445, holds that erroneous instructions that are misleading or misdirects the jury and prejudicial to the accused is grounds for a new trial.

In the instant case instruction number two and the paragraph numbered first and the statement that "A special right to possession is sufficient basis to establish ownership", would tend to mislead the jury as to the ownership of the meat. The appellant was

charged by information for wilfully, unlawfully, and feloniously steal, take and carry away in excess of 800 lbs. of dressed meats, the personal property of Gary Hill, doing business as Box Elder Pack, having a value of more than \$ 50.00. Mr. Hill testified that he had a partner in the business of Box Elder Meat Packing (Tr. 79).

The meat could of been the personal property of Mr. Gary Hill or could of been the personal property of Mr. Grant Thompson the partner in the business. The instruction would tend to mislead the jury as to their finding of whose personal property it was, Mr. Hill's or Mr. Thompson's. The instruction would also tend to defeat defense counsel's request for a certain instruction (Tr. 86).

The appellant was prejudiced by the instruction where the personal property of the matter was one of the most essential

elements in respect to finding the appellant guilty of Grand Larceny as charged in the Information and if not given there would have been a substantial chance that the results would of been different.

The trial court committed prejudicial error and abused its discretion by charging the jury with Instruction numbered five and the phrase, "In fact, the evidence points to the contrary,". The court after it had given the instruction orally, it deleted that part of the instruction, therefore calling special emphasis to it in the written instrument.

The Oklahoma Court held in Chambers v. State, 28 Okl.Cr. 156, 229 P. 646, that remarks and comments of the court as to the weight and sufficiency of the evidence or as to the guilt of accused constitute grounds for new trial.

In the instant case the phrase in the

instruction numbered five given to the jury by the trial court pointing out to the jury that the evidence was in fact enough to convict the appellant was highly prejudicial to the appellant.

The appellant was prejudiced where the jury could not consider the evidence and testimony as it was presented. The instruction would of influenced them in their consideration of the weight and sufficiency of the evidence. The jury would of felt obligated by that phrase to go back in the courtroom with nothing less then the verdict of guilty.

The trial court therefore arbitrarily abused its discretion by charging the jury with the phrase of "In fact, the evidence points to the contrary," and is clearly prejudicial to the appellant.

POINT V

THE TRIAL COURT ERRED IN DENYING DEFENSE

COUNSEL'S MOTION FOR JUDGMENT OF ACQUITTAL
NOTWITHSTANDING THE VERDICT

Defense counsel motioned the trial court for the judgment of acquittal notwithstanding the verdict where the trial court denied the motion (Tr. 90). Defense counsel before the submission of the case to the jury motioned the trial court for dismissal (Tr. 82-85). The trial court denied the motion (Tr. 86).

In the case of State v. Frisby, 49 U. 227, 162 P. 616, the Utah Court held that the evidence must, in all respects, be sufficient to sustain the conviction.

The conviction in the instant case is based on a certain amount of meat that was found in the back of a panel truck and the back seat of a car by Officer Julian of the Salt Lake County Sheriff's Office at Six-fifty West 3300 South in Salt Lake City, Utah.

Mr. Gary Hill testified that he had meat missing from his place of business in

Provo City, Utah, but does not know the exact amount taken, who took it, or when it was taken (Tr. 54-56). He also testified that he saw some meat in the cooler of the Salt Lake County Jail where he sold it (Tr. 58-60). There was no testimony offered that the meat that Mr. Hill saw in and sold to the Salt Lake County Jail was one and the same meat that was found by Officer Julian at Six-fifty West 3300 South in Salt Lake City, Utah.

Mr. Bowden who reported the incident testified he did not know the exact time when the truck and car were removed from the scene (Tr. 26).

Officer Julian testified that he never saw the meat and packages after the truck was removed from the scene (Tr. 39).

Mr. Hill testified to State's Exhibit 6, 7, 8, 9, and 10, which were photographs taken

of the truck and car at Six-fifty West 3300 South in Salt Lake City, Utah. He could not identify that any of the meat or packages in the photographs were in fact his personal property having a value (Tr. 78-82) and that it could of been the property of anyone (Tr. 80-81).

The evidence therefore fails to be sufficient in all respects to sustain the conviction of the appellant as to the Information and that being, That on the 5th day of January, 1969, said Defendant did then and there willfully, unlawfully, and feloniously steal, take and carry away in excess of 800 lbs. of dressed meats, the personal property of Gary Hill, doing business as Box Elder Pack, having a value of more than \$ 50.00 (R. 12).

The Utah Court held in State v. Hall, 105 U. 162, 170, 145 P.2d 494, 497, rev'g on rehearing 105 U. 151, 139 P.2d 228, that upon

the trial for an information for larceny, it is essential that the State prove that defendant committed the crime charged in the information. A conviction cannot be had for any act other than the one intended from the beginning to be charged.

The prosecution in the instant case failed to make its proof in conformance with the Information where the information is defective in that it fails to identify the appropriate assumed name of the alleged aggrieved person. Mr. Hill testified that all of the licenses are issued in the name of Box Elder Meat Packing Company and not Box Elder Pack as in the information (Tr. 53, 56-57). The prosecution failed to make its proof in conformance with the Information where the information is defective in that it fails to identify as to the partnership of Mr. Hill. Mr. Hill testified that he had a partner in the business (Tr. 79-81).

There was nothing offered as to the actual partnership existing between Mr. Gary Hill and Grant Thompson therefore not knowing the actual ownership of the meat, the meat that was taken from the business could of been th personal property of Mr. Thompson.

The appellant not having committed a crime as charged in the Information, the trial court therefore erred in denying defense counsel's motion for judgment of acquittal notwithstanding the verdict.

CONCLUSION

For the reasons above stated, the appellant therefore submits that his conviction in the lower court should be reversed; or if the Court does not feel justified by the facts in so doing, that it should reverse the conviction and remand the case back for a new and fair trial.

Respectfully submitted,

Craig Carlsen
P.O. Box 250
Draper, Utah 84020

Propria Persona